In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-231

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and JOHN E. BRYSON, VERNON L. STURGEON, RICHARD D. GRAVELLE, CLAIRE T. DEDRICK and LEONARD M. GRIMES, JR., the members of said PUBLIC UTILITIES COMMISSION; W. MICHAEL BLUMENTHAL, Secretary of the Treasury, an agency of the United States of America; and JEROME KURTZ, Commissioner, Internal Revenue Service, an agency of the United States of America; CITY OF LOS ANGELES, a municipal corporation; CITY OF SAN DIEGO, a municipal corporation; CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; TOWARD UTILITY RATE NORMALIZATION,
Respondents.

No. 79-232

GENERAL TELEPHONE COMPANY OF CALIFORNIA,
A California corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Respondents.

CITY OF LOS ANGELES, CITY OF SAN DIEGO, CITY AND COUNTY OF SAN FRANCISCO, TOWARD UTILITY RATE NORMALIZATION,
Intervenors.

ON PETITIONS FOR WRITS OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS PUBLIC UTILITIES COMMISSION, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND CITY OF SAN FRANCISCO IN OPPOSITION

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INTRODUCTION

Respondent California Public Utilities Commission (Commission) and Respondents City of San Diego, City of Los Angeles and City and County of San Francisco (Cities) respectfully request this Court to deny the petitions of Pacific Telephone Company and General Telephone Company for writs of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on July 18, 1979, upholding the district court's denial of a preliminary injunction in this matter. (*Pacific Telephone and Telegraph Company v. Public Utilities Commission*, Nos. 79-3150 and 79-3151, slip op. (CA 9, July 18, 1979) (Petitioner's Joint Appendix, pp. 1a-15a, cited hereinafter as Pet. App.)

OPINIONS BELOW

In addition to the opinions below contained in Pet. App., attached hereto as Respondents Appendix (hereinafter Res. App.), is the opinion of Mr. Justice Rehnquist, Circuit Justice, (*Pacific Telephone and Telegraph Co. v. Public Utilities Commission*, Nos. A-101 and A-102, slip op. (U.S. S. Ct., August 13, 1979).

STATEMENT OF THE CASE

A statement of the case is contained in the Ninth Circuit's opinion (see Pet. App. pp. 2a-4a) and Mr. Justice Rehnquist's opinion (see Res. App. pp. A-1 to A-6) and will not be repeated here. Mr. Justice Rehnquist summed up the status of this case by saying:

> The net of it is that I believe applicant's federal court litigation is new wine in old bottles. When it was new wine in new bottles, last Term, this Court denied certiorari, and I have no reason to believe that any intervening events would change that outcome. (Res. App. p. A-5)

QUESTION PRESENTED

Should the petitioners be allowed to collaterally attack in the federal courts a decision of the California Public Utilities Commission (Commission) after the California Supreme Court has denied a petition for writ of review, the United States Supreme Court has denied a petition for certiorari, a federal district court has denied a preliminary injunction based on the doctrine of res judicata, the Ninth Circuit Court of Appeals has affirmed the denial of the preliminary injunction of the district court and has denied petitioners' request for a stay of mandate in order that they might petition this Court for certiorari and Mr. Justice Rehnquist, Circuit Justice, has denied petitioners' request for a stay of the mandate of the Court of Appeals for the Ninth Circuit?

REASONS FOR DENYING THE WRIT

I

THE JUDGMENT BELOW IS IN AGREEMENT WITH DECISIONS OF THIS COURT AND WITH THE JUDGMENTS OF OTHER UNITED STATES COURTS OF APPEALS AND WITH THE RULINGS OF OTHER PANELS OF THE NINTH CIRCUIT COURT OF APPEALS

A. Petitioners Misstate the Question

Petitioners allege that:

> The sole question resolved below is that the Decision of the California Public Utilities Commission on the

question of Petitioner's federal tax liability must be treated as an estoppel against the consideration of that federal tax question in subsequent litigation in the appropriate federal district court.

(Pacific's petition, p. 8).

The Ninth Circuit made no such finding and, significantly, Pacific does not cite the opinion in making this claim. The Ninth Circuit's opinion is in no way inconsistent with any of the cases that have been cited by petitioners. Those cases involved attempts to block a federal action by asserting a state court decision as a bar to the federal action. However, in the present matter, petitioners do not seek a right to pursue a federal remedy; rather petitioners seek to *overturn a state decision*. The Ninth Circuit simply held that res judicata barred the latter; i.e., reversal of the state court decision. The state decision was held not to bar any action that petitioners might undertake in federal court under the federal tax laws or any actions the Internal Revenue Service may file in federal courts. The Ninth Circuit stated:

"Moreover, appellants will have an opportunity to present to the Federal Courts their contentions regarding the proper interpretation of federal tax statutes if and when the IRS seeks to collect the additional taxes. Additionally appellants may also have an opportunity to litigate those interpretations in their declaratory relief action . . ." (Pet. App. p. 152 (footnote 15))

The Ninth Circuit further stated:

"We need not determine, however, if later cases have eroded federal deference to state interpretations of federal questions. In the instant case appellants' constitutional claims are frivolous. *See* note 15 *infra*. And

the federal courts have not been asked in this proceeding for injunctive relief to interpret a federal statute. Appellants went to state court to have it overturn a state agency's rate order. Now they ask the federal courts to overturn the order. While appellants' underlying disagreement with the rate order is that the PUC allegedly misunderstood federal tax law (assuming that the IRS's interpretation is correct), whether this misunderstanding vitiates the rate order does not involve construction of a federal statute, but rather depends upon the scope of the PUC's discretion in setting rates. Cf. Napa Valley Electric Co. v. R.R. Comm'n, 251 U.S. 366, 372 (1920)." (Pet.App. p. 6a (footnote 6))

Here, the Ninth Circuit is recognizing, *inter alia*, the important distinction between the Commission rate case and a potential federal tax case, the distinction which petitioners fail to draw. Moreover, the key point, as recognized by the Ninth Circuit, is that the relief sought by petitioners is the overturning of the state court order and that relief *only* is barred by res judicata.

B. This Court's Decision

Petitioners attempt to rely on the recent decision of *Brown v. Felsen*, ... U.S. ....., 60 L.Ed.2d 767, 99 S.Ct. ....., (1979) for the proposition that the state court judgment is not binding on the federal courts. It is respectfully submitted that their reliance is misplaced. The Commission's decision determined intrastate rates for the petitioners and *Brown v. Felsen* supports the proposition that this rate order is final and binding. In *Brown v. Felsen*, Creditor wins a collection suit against Debtor in the state court. The suit was settled by stipulation which did not indicate

the cause of action on which Debtor's liability to Creditor was based (*Brown v. Felsen, supra,* ..... U.S. ....., 60 L.Ed.2d at 769). Debtor then filed a petition for voluntary bankruptcy in Federal Court and sought to have the debt to Creditor discharged. In Bankruptcy Court Creditor sought to establish that Debtor's debt was not dischargeable as it was the product of fraud, etc. and fell under Section 17a(2) and 17a(4) of the Bankruptcy Act. No one in *Brown v. Felsen* contested the fact that the state court decree establishing the debt was binding on all parties. The Court said:

> Here, in contrast, petitioner readily concedes the prior decree is binding. That is the cornerstone of his claim.
>
> *Brown v. Felsen, supra,* ..... U.S. ....., 60 L.Ed.2d at 772.

The basic distinction between this proceeding and *Brown v. Felsen* is that nobody was contesting the state court's judgment that Debtor owed Creditor some money. It was only after Debtor raised a new defense in the bankruptcy action, i.e., dischargeability, that it became necessary for Creditor to prove that the debt was not dischargeable under § 17. This had not been in issue in the state court case whereas here the issue of proper rates for petitioners was the issue in state court. Just as the establishment of the debt in *Brown v. Felsen* was accepted by the bankruptcy court the establishment of proper rates for petitioners should be accepted by this Court.

Similarly, the petitioners reliance on Mr. Justice Brennan's dissent in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 57 L.Ed.2d 504, 98 S.Ct. 2552 (1978) is misplaced. The

Commission's decision set intrastate telephone rates. It did not decide, in any manner which could be binding on the federal courts, the issue of petitioners federal income tax liability. Mr. Justice Brennan said:

> For myself, I confess to serious doubt that it is ever appropriate to accord res judicata effect to a state court determination of a claim over which the federal courts have exclusive jurisdiction . . .
>
> *Id.* at 674.

In this proceeding the state court did not determine a claim over which the federal courts have exclusive jurisdiction. The determination of whether or not the petitioners will be eligible or ineligible for federal tax benefits will be determined in the federal courts—that is the "determination of a claim." The Commission only found certain facts concerning the federal tax law which influenced it in its ratemaking determination.

Petitioners assert that the Commission's decision must fall by the wayside because of this Court's decision in *Montana v. United States,* ..... U.S. ....., 59 L.Ed.2d 210, 99 S.Ct. 920 (1979). In *Montana* a contractor for a federal project instituted an action in a state court to declare a state tax unconstitutional. The United States supported and directed the contractor's action. The United States also subsequently filed a federal district court suit asserting the same cause of action as the state suit. The Montana Supreme Court upheld the state tax. A three-judge district court heard the United State's case and held the tax unconstitutional. This court reversed on the grounds that the Government had a full and fair opportunity to press its consti-

tutional challenges in the state court and was therefore estopped from seeking a contrary resolution of those issues in the federal court (*Id.* at 59 L.Ed.2d 223-224).

The issue that was fully decided in the Comission's Decision was the proper ratemaking treatment of petitioners' federal income taxes. In *Montana* this Court said:

> "A fundamental precept of commonlaw adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ." Southern Pacific R. Co. v. United States, 168 US 1, 48-49, 42 L.Ed. 355, 18 S.Ct 18 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Cromwell v. County of Sac., 94 US 351, 352, 24 L.Ed. 195 (1877); Lawlor v. National Screen Service Corp. 349 US 322, 326, 99 L.Ed. 1122, 75 S.Ct. 865 (1955); 1B J. Moore, Federal Practice ¶ 04.05. [1], at 621-624 (2d ed 1974); Restatement (Second) of Judgments § 47 (Tent Draft No. 1, March 28, 1973) (merger); Id., § 48 (bar)."
>
> *Id.* at 59 L.Ed.2d 216-217.

The Court further explained the reasons for the doctrines of res judicata and collateral estoppel:

> ". . . Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. Southern Pacific Railroad, supra, at 49, 42 L.ed 355, 18 S.Ct. 18; Hart Steel Co. v. Railroad Supply Co. 244 US 294, 299, 61 L.E. 1148, 37 S.Ct. 506 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action my minimizing the possibility of inconsistent decisions. [fn. omitted.]"

In addition to the doctrine of repose the Court said:

> "Considerations of comity as well as repose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court."
>
> *Id.* at 59 L.Ed. 2d 223.

It is respectfully submitted that petitioners have had their day in court and the petitions for writs of certiorari should be denied.

C. Lower Federal Court Decisions

It is for this same reason that the lower federal court decisions cited by petitioners are inapposite. *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir. 1955), *cert. denied*, 350 U.S. 825 (1955) and *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967) are cases concerning anti-trust actions and the relationship between federal and state courts in that context. *American Mannex Corp. v. Rozands*, 462 F.2d 688 (5th Cir. 1972), *cert. denied*, 409 U.S. 1040 (1972) was a case in which taxpayers sued in federal district court to contest the imposition of a Louisiana state ad valorem tax on certain of their property. The same taxpayers had contested in state court the levy of the same tax on the same property, raising the same con-

stitutional objection (*id.* at 689). The district court held that the federal suit was barred by the earlier state court determination of the constitutional issue between the same parties and the Fifth Circuit Court of Appeals agreed (*ibid.*). The Court said:

> "When the parties and the cause of action litigated are the same in state court as in federal court, the doctrine of res judicata has been held to bar federal relitigation, even if a federal constitutional question is in dispute [citations omitted]. Similarly, it has been held that disputed factual or legal issues arising between the same parties cannot be relitigated in federal court after a valid state court determination of the same issues."
>
> *Id.* at 690.

These petitions for certiorari are simply an effort to relitigate issues which have been determined adversely to petitioners by the administrative and judicial processes of the State of California, and with regard to which this Court denied certiorari and denied rehearing last Term. 439 U.S. 1052 (1978); 440 U.S. 931 (1979). (*Pacific Telephone & Telegraph Co. v. Public Utilities Commission,* Nos. A-101 and A-102, slip op. at 3, (U.S. S.Ct., August 13, 1979) (Res. App., p. 2a)).

In re Houtman, 568 F.2d 651 (9th Cir. 1978) is a bankruptcy case concerning the proper court to determine dischargeability of debts. The same arguments presented concerning *Brown v. Felsen, supra,* are applicable to *In re Houtman* and will not be repeated here.

Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977) was a case concerning whether David Red Fox had his rights

under the Indian Civil Rights Act (25 U.S.C. § 1302(8)) violated. A tribal court had granted his wife a default decree of divorce and the Oregon state courts had held that the tribal court decree was entitled to recognition. The Federal District Court held that the federal action instituted by David was barred by the principles of res judicata and collateral estoppel inasmuch as the federal action necessarily involved the same issues as had been litigated and resolved against David in the Oregon courts (*Id.* at 363).

It is respectfully submitted that none of the above cases, cited by petitioners, are at variance with the decisions below of the District Court and the Ninth Circuit.

II

UNDER THE CALIFORNIA CONSTITUTION THE PRIOR ACTION OF THE CALIFORNIA COURT IS ENTITLED TO RES JUDICATA EFFECT

The continued vitality of *Napa Valley Electric Co. v. Railroad Commission,* 251 U.S. 366 (1970) which held that, under California law, the California Supreme Court's denial of writs of review of rate decisions constitute a denial on the merits is fully discussed by the Ninth Circuit in *Pacific Telephone & Telegraph Co. v. Public Utilities Commission,* No. 79-3150, slip. op. at 4-10, (CA9, July 18, 1979) (Pet App. pp. 4A-15A). Mr. Justice Rehnquist, as Circuit Justice held that:

> "If I thought it necessary in passing upon this stay application to determine the present day correctness of this Court's reading of California law in *Napa Val-*

ley Co. v. Railroad Commission, 251 U.S. 366 (1920), I would naturally defer to the opinion of the Court of Appeals, which must deal with California law more frequently than does this Court."

Pacific Telephone & Telegraph Co. v. Public Utilities Commission, Nos. A-101 and A-102, slip op. at 4 (U.S. S.Ct., August 13, 1979) (Res. App. p. A-4).

It is respectfully submitted that the Ninth Circuit's reading of California law is correct and that no basis exists for issuing a preliminary injunction.

CONCLUSION

Respondents have not addressed various of the arguments of petitioners in depth. We respectfully refer to the opinion of the Ninth Circuit and the opinion of Mr. Justice Rehnquist, which are included in this record, and the joint Opposition To Application For Temporary Stay Of Decision Of The Court Of Appeals For The Ninth Circuit Pending Application For Certiorari filed by respondents before this Court in Nos. A-101 and A-102. We also respectfully refer to further discussion of various of petitioners' arguments in the following pleadings filed before this Court in Nos. 78-606 and 78-607, the proceedings wherein petitioners unsuccessfully sought review of respondent Commission's decision in the October, 1978 Term: Brief For Respondent Public Utilities Commission In Opposition, Brief In Opposition To Petitions For Writ Of Certiorari filed by respondent Cities, and Reply to Memorandum For The United States As Amicus Curiae, filed by respondent Cities.

For the reasons herein stated, it is respectfully submitted that certiorari should be denied.

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(Appendix Follows)

APPENDIX

APPENDIX

Supreme Court of the United States

Nos. A-101 and A-102

Pacific Telephone & Telegraph Co.,
Petitioner,

A-101 v.

Public Utilities Commission of
California et al.

General Telephone Co.,
Petitioner,

A-102 v.

Public Utilities Commission of
California et al.

On Applications for Stay.

[August 13, 1979]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I continue in effect a temporary injunction issued by the Court of Appeals for the Ninth Circuit on April 2, 1979, pending disposition by the full Court of their petitions for certiorari to review the judgment of the Court of Appeals. On July 18 that court, in a consolidated case in which both applicants were appellants, affirmed the judgment of the United States District Court for the Northern District of California denying applicants' injunctive relief against the enforcement of a rate order earlier promulgated by respondent California Public Utility Commission (PUC). The PUC in September 1977

(Decision No. 87838), had ordered applicants to refund charges paid by subscribers before 1978 and to reduce certain of its rates for that and future years. The PUC, however, stayed implementation of its order pending judicial review. *Pacific Telephone & Telegraph Co. v. Public Utilities Comm'n,* No. 79-3150, slip. op., at 2 (CA9, July 18, 1979).

After the Supreme Court of California denied applicants' request for review, applicants petitioned this Court for certiorari. Applicants argued this Court should review the PUC rate order because it was premised on the PUC's interpretation of an unsettled question of federal tax law. They claimed that if this interpretation subsequently proved incorrect, they would be subject to substantial liability in back taxes. Applicant Pacific Telephone also challenged the PUC's decision on the ground that it violated the Due Process Clause. The petitions were denied on December 12, 1978. 439 U. S. 1052, with MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN dissenting from the order of denial. Petitions for rehearing were thereafter denied on February 21, 1979, 440 U. S. 931. On March 14, 1979, the PUC terminated the stay of its own order of September 13, 1977, stating in its order so doing that "the avenues of judicial review have been exhausted." *Pacific Telephone & Telegraph Co., supra,* slip op. at 2. The following day applicants filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of California. That court denied relief, but the Court of Appeals granted its own temporary injunction on April 2, 1979, pending consideration of applicants' appeal from the order of the District Court. Last month, as previously

noted in this opinion, the Court of Appeals affirmed the judgment of the District Court, dissolved its own injunction, and denied applicants' request for a stay of mandate in order that they might petition this Court for certiorari.

With this sort of procedural history, one would expect applicants' petitions for certiorari to deal principally with questions arising under the United States Constitution or laws governing the setting of rates by state utility commissions for public utilities. But the questions which applicants seek to have reviewed on certiorari pertain to the application of federal tax statutes as they relate to depreciation which may be claimed by public utilities. Since it is this type of question which applicants seek to litigate if certiorari is granted, one would likewise expect either an agency or officer of the United States having some responsibility for administering these tax statutes named as respondents, instead of the California PUC or intervening California municipal corporations. Without dwelling further on the anomalous nature of applicants' petitions for certiorari, I have concluded that their actions in the United States District Court for the Northern District of California begun in March 1979, were simply an effort to relitigate issues which had been determined adversely to them by the administrative and judicial processes of the State of California, and with regard to which this Court denied certiorari and denied rehearing last Term. 439 U. S. 1052 (1978); 440 U.S. 931 (1979). These denials took place notwithstanding the fact that the Solicitor General urged the Court to grant certiorari and decide the issues presented by the petitions.

The PUC in its Decision No. 90094, rendered on March 14, 1979, after the proceedings in this Court, was doing no more than formally stating that the conditions on which its stay had been granted—exhaustion of judicial review—had occurred, and therefore the stay expired by its own terms. The PUC dissolved this stay despite applicants' contention that the PUC's interpretation of federal tax law in Decision No. 87838 was incorrect and that the rate order would consequently result in the IRS's assessment of substantial tax deficiencies against applicants. In my opinion, the determination of whether or not the PUC's rate order should have been stayed pending resolution of the federal tax issues was, at this late stage in the proceedings, entirely a matter for the State to decide.

One need not question the assertion of applicants that very large financial stakes hinge on the manner in which the IRS, subject to whatever review of its action is provided by law, treats the refund and rate reduction orders imposed by the PUC's order of September 13, 1977. Nor need one doubt that this Court had jurisdiction, under cases such as *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977), to review applicants' earlier petitions for certiorari in Nos. 78-606 and 78-607, O. T. 1978, on the ground that the PUC had reached a decision based on a misapprehension of federal law which it might not have reached had it correctly understood federal law. But that is now water over the dam. This Court denied those petitions last Term, and denied petitions for rehearing.

If I thought it necessary in passing upon this stay application to determine the present day correctness of

this Court's reading of California law in *Napa Valley Co.* v. *Railroad Commission*, 251 U. S. 366 (1920), I would naturally defer to the opinion of the Court of Appeals, which must deal with California law more frequently than does this Court. But I do not actually think it is necessary to make this determination; a State may enunciate policy through an administrative agency, as well as through its courts, and so long as there is an opportunity for judicial review the fact that such review may be denied on a discretionary basis does not make the agency's action any less the voice of the State for purposes of this Court's jurisdiction or for purposes of federal-state comity. See *United States* v. *Utah Construction Co.*, 384 U. S. 394, 419-423 (1966). Nor is this a case where any claim of bias is made against the agency, see *Gibson* v. *Berryhill*, 411 U. S. 564 (1973), or where an action of the federal court's in refusing to allow applicants to relitigate the merits of their claim on which this Court has previously denied certiorari amounted to the imposition of a requirement of "exhaustion of administrative remedies." Here the administrative action was the source of the claimed wrong, not a possible avenue for its redress.

The net of it is that I believe applicants' federal court litigation is new wine in old bottles. When it was new wine in new bottles, last Term, this Court denied certiorari, and I have no reason to believe that any intervening events would change that outcome. Accordingly, without considering the second part of the requirement which applicants must meet in order to obtain a stay—the so-called "stay equities"—the temporary stay which I previously issued

is dissolved forthwith, and applicants' request for a stay of the mandate of the Court of Appeals for the Ninth Circuit is hereby

Denied.

Dated in Washington, D. C. this
13th day of August, 1979.